No. 78-1731

In The Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF NEW MEXICO AND JAMES R. BACA, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-22a) is reported at 590 F.2d 323. The district court's findings of fact and conclusions of law (Pet. App. 3a-8a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1978 (Pet. App. 11a). On March 12, 1979, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including May 17, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1161 requires an Indian tribe owning and operating a liquor outlet on its reservation to obtain a state liquor license.
2. Whether the State of New Mexico has jurisdiction, at tribally owned and operated facilities within the Mescalero Apache Indian Reservation, to enforce its laws governing the possession, sale, service, and consumption of alcoholic beverages.

STATEMENT

Alcoholic beverages are sold at three locations within the Mescalero Apache Indian Reservation.[1] At one of these locations, a tribal bar in Mescalero, New Mexico,

[1] The Mescalero Apache Tribe was recognized by the United States government in the Treaty of July 1, 1852, 10 Stat. 979. The Mescalero Apache Indian Reservation was created by a series of eight executive orders, the first of which was issued on May 23, 1873, and the last on February 17, 1912. Substantially all of the lands within the reservation are held by the United States for the use of the Tribe (Pet. App. 3a). The Tribe has a constitutional government organized pursuant to 25 U.S.C. 476. In 1965, the Tribe adopted an ordinance governing the sale and consumption of alcoholic beverages on the reservation (Pet. App. 4a, 24a-25a). The ordinance was certified by the Secretary of the Interior and published in the Federal Register (30 Fed. Reg. 3553 (1965)).

liquor has been sold for more than ten years without a state license. The sale of alcoholic beverages at the second location, a bar at Apache Summit, is licensed by the State of New Mexico (Pet. App. 5a). The third place at which liquor is sold within the reservation, and the primary focus of this litigation, is the Inn of the Mountain Gods, a tribally owned and operated resort complex, revenues from which are used for "the education, social and economic welfare and governmental needs of the Mescalero Apache people" *(ibid.)*. Since July 1975, alcoholic beverages have been sold at the Inn of the Mountain Gods without a state liquor license.

On April 2, 1965, ten years before the Inn opened, an official of the New Mexico Division of Liquor Control informed the Tribe in a letter that it could establish its own liquor operation on reservation land without coming under the Liquor Division's control (Pet. App. 4a). In September 1975, shortly after the Inn opened, the State adopted a contrary view. Relying on this Court's decision in *United States* v. *Mazurie*, 419 U.S. 544 (1975), the New Mexico Department of Alcoholic Beverage Control ordered the Tribe to "cease all sale, service, possession or the permitting of consumption of alcoholic liquors and intoxicants at the Inn of the Mountain Gods * * * until it has been clearly determined under what conditions the sale, service, consumption, or possession may be allowed" (Pet. App. 27a). The State also ordered liquor wholesalers to cease deliveries to the tribal bars (*id.* at 6a). The State has threatened to send law enforcement officers onto the reservation to enforce New Mexico's liquor laws (*ibid.*).

Because of statutory quotas restricting the number of liquor licenses that may be issued in New Mexico, and because the State refused to approve the transfer of the Apache Summit bar license to the Inn of the Mountain Gods, the Tribe can obtain a license only by purchase or lease from an existing holder. The purchase price for a license is more than $50,000 (Pet. App. 6a).

Acting on its own behalf and on behalf of the Tribe, the United States brought this action in the United States District Court for the District of New Mexico. The complaint sought a declaration that the Tribe had sole authority to license and regulate the sale of liquor through tribally operated outlets located within the reservation. It also sought an injunction prohibiting the State from ordering law enforcement personnel to enforce State liquor laws in connection with the Tribe's sale of alcoholic beverages within the reservation.

The district court granted the relief requested (Pet. App. 1a–10a). The court ruled (*id.* at 7a) that "[a]s between the Mescalero Apache Tribe and the State of New Mexico, the Mescalero Apache Tribe has sole jurisdiction for regulating the licensing, sale, possession and distribution of alcoholic beverages at tribal-owned outlets within the exterior boundaries of the Mescalero Apache Reservation." The court stated that the federal Constitution grants to Congress the sole authority to regulate commerce with the Indian tribes and that "[t]he federal government and the Mescalero Apache Tribe have preempted the State of New Mexico from any jurisdiction it might arguably have had to regulate the licensing of tribal-owned liquor outlets and to regulate the sale of alcoholic beverages at such outlets within the exterior boundaries of the Mescalero Apache Reservation" (*ibid.*). The court held that neither the Twenty-first Amendment nor 18 U.S.C. 1161 authorizes New Mexico to exercise jurisdiction to enforce its liquor laws within the reservation (*ibid.*).

The court of appeals affirmed (Pet. App. 12a–22a). Like the district court, the court of appeals cited Article I, Section 8, Clause 3 of the United States Constitution as the legal basis for Congress' authority to regulate commerce with the Indian tribes (*id.* at 20a). After reviewing the relevant decisions of this Court, the court of appeals concluded (*ibid.*) that "regulatory powers in Indian country or on Indian lands belong to the Congress except for inherent jurisdiction of the tribes.

Congress may delegate this authority to the state, but when it does so it must be in specific terms. Section 1161 * * * does not delegate this authority either expressly or impliedly." The court of appeals also rejected New Mexico's argument that the Twenty-first Amendment authorizes States to enforce their liquor licensing laws on Indian reservations (Pet. App. 22a).

ARGUMENT

The decision of the court of appeals is correct and does not warrant further review.

1. This Court has settled that Congress may regulate commerce in liquor with the Indian tribes. *United States* v. *Mazurie*, 419 U.S. 544, 554–555 (1975); *Perrin* v. *United States*, 232 U.S. 478, 482 (1914). Congress has long occupied this field. See, *e.g.*, *United States* v. *43 Gallons of Whiskey*, 93 U.S. 188, 194 (1876). As a consequence, the states are precluded from imposing their own regulatory scheme without congressional consent. This follows from *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685 (1965), in which the Court invalidated a state tax on persons trading with the Indians on the reservation and held that federal regulation had preempted the field.

Because of the comprehensive federal regulation of commerce with the Indians, this Court has repeatedly ruled that, in the absence of a federal statute specifically authorizing the states to license or tax certain activity by Indians on the reservation, the state cannot exercise such power. *Bryan* v. *Itasca County*, 426 U.S. 373, 376–377 (1976); *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480–481 (1976); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 177–181 (1973). See also *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789 (1945). In light of this policy, courts will not interpret a statute to grant States jurisdiction

over Indians on reservations unless there is a clear and unambiguous expression of congressional intent to terminate Indian immunity from state law. *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 392-393. Doubtful expressions are resolved in favor of the Indians. *Ibid.*

Congress has not authorized the states to regulate the sale of alcoholic beverages by Indians on the reservation. In particular, Section 1161 of the federal criminal code, on which petitioners rely, does not confer such authority on the states. The statute merely provides that federal criminal laws prohibiting the sale and possession of liquor in Indian country do not apply to any act or transaction that "is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction * * * ." This provision was enacted to give individual tribes the option of retaining the existing federal prohibition against the introduction of liquor into "Indian country" or regulating liquor sales and use in conformity with state law and under an ordinance approved by the Secretary of the Interior. *United States* v. *Mazurie*, *supra*, 419 U.S. at 547. The statute does not address the extension of state control over liquor transactions to Indian reservations.[2] Instead, Section 1161 contemplates that state substantive standards

[2]The language of Section 1161 may be compared to that found in the Clean Air Amendments of 1970, 42 U.S.C. 1857f, and the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1323. In *Hancock* v. *Train*, 426 U.S. 167 (1976), and *EPA* v. *State Water Resources Control Board*, 426 U.S. 200 (1976), this Court held that the Clean Air Amendments and the FWPCA Amendments do not authorize States to insist that federal air and water pollution control facilities obtain state operating permits. The Court's more recent decision in *California* v. *United States*, 438 U.S. 645 (1978), acknowledged that state permit requirements govern the appropriation of water for federal water projects, but the Court reached that result against the unique backdrop of federal deference to state water law. No such tradition of deference to the states exists where Indians and their activities on a reservation are concerned.

concerning such matters as hours of sale or sale to minors will be incorporated by reference in much the same way as state law is incorporated for purposes of defining federal offenses under the Assimilative Crimes Act. See 18 U.S.C. 13, 1152.[3]

The statutory reference to state law defines an exemption from the federal prohibitions regarding the introduction of liquor into Indian country. If alcoholic beverages are sold on a reservation in violation of the applicable state law, the exemption provided in Section 1161 will not apply, and the offending parties will be subject to prosecution under one or more of the federal criminal provisions enumerated in Section 1161 (*i.e.*, 18 U.S.C. 1154, 1156, 3113, 3488, 3618). But Section 1161 evidences no intent to extend state jurisdiction or enforcement authority to the activities of Indians on the reservation.[4]

[3]The model of the Assimilative Crimes Act demonstrates the fallacy in petitioners' argument that Congress must have intended that the state enforce state law on Indian reservations because uniform administration demands that a single prosecutor be empowered to apply and interpret state law in a consistent fashion.

[4] Because federal criminal prosecution remains a possible consequence if the sale of liquor on the reservation does not conform with state law, the effect of the court of appeals' decision will hardly be as drastic as petitioners suggest. Petitioners incorrectly state (Pet. 11-12; footnote omitted) that the Tenth Circuit's decision "would preclude even a federal prosecution under Section 1154 or 1156 for failure to comply with State law." In support of this proposition, they state (Pet. 12 n.5) that "the United States is permitting the Inn of the Mountain Gods to operate without conforming to the licensing requirement of State law." The response to this argument is twofold. In the first place, Section 1161's incorporation of state law does not necessarily mean that Indians desiring to sell liquor on the reservation must comply with state licensing provisions as well as substantive state laws concerning the hours during which liquor may be sold, the sale of liquor to minors, and other such matters. The better view appears to be that, when Congress

Petitioners also contend (Pet. 16–21) that the ruling of the courts below prohibits the States from enforcing the criminal provisions of their liquor laws against non-Indians on the reservation and is therefore inconsistent with this Court's decisions in *United States* v. *McBratney*, 104 U.S. 621 (1881), *Draper* v. *United States*, 164 U.S. 240 (1896), and *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946). Those cases involved violent crimes by non-Indians against non-Indians on the reservation; they are inapposite to the situation presented here. The ruling below does not directly discuss New Mexico's authority to enforce its liquor laws with respect to establishments owned and operated by non-Indians on the reservation, and no such question is involved in this litigation. The only matter now in controversy is whether the Mescalero Apache Tribe must have a state liquor license in order to sell alcoholic beverages at the Inn of the Mountain Gods. The district court and the court of appeals correctly answered that question in the negative.

2. The court of appeals correctly ruled (Pet. App. 22a) that the Twenty-first Amendment does not authorize the States to enforce their liquor licensing laws on Indian reservations. The Amendment prohibits the "transportation or importation into any State * * * for delivery or use therein of intoxicating liquors, in violation of the laws thereof * * * ." But the Mescalero Apache Reservation is a jurisdiction separate and apart from the State of New Mexico. Liquor transported to the reservation for sale and consumption on the reservation is not brought into New Mexico "for delivery or use therein." The delivery and use is on the reservation and under a distinct sovereignty. Just as the Twenty-first Amendment does not authorize the states to regulate the sale of liquor on national park lands within state borders, so it does not expand the jurisdiction of the states to reach within the boundaries of Indian reservations. See *Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 536–538 (1938).

enacted Section 1161 in 1953, it intended to permit Indian tribes to decide to sell and use liquor on the reservation to the same extent that the surrounding State permits such sale and use or to some lesser extent set forth in a tribal ordinance. There is no indication in Section 1161 that Congress intended to compel Indian tribes to seek a state license for each location on the reservation at which a tribe wishes to sell liquor. Moreover, even if this was Congress' intent, a tribe's failure to obtain a license required by a state law would give rise to a violation of *federal*, not state, law. If a failure to obtain a license meant that subsequent sales of liquor by Indians were not in conformity with state law, within the meaning of Section 1161, then the exemption provided by Section 1161 would no longer be available and the sales would violate 18 U.S.C. 1154 and 1156. Although federal prosecution might be appropriate in such instances, there would still be no justification for petitioners' insistence that the State itself could enforce its licensing requirements on the reservation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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